The Value of Date of Marriage Debt: Zavarella v. Zavarella, 2013 ONCA 720

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Zavarella v. Zavarella, 2013 ONCA 720 (CanLII) ("*Zavarella*"), illustrates the sometimes conflicting priorities in family law: the desire to achieve an equitable resolution of a particular couple's matrimonial dispute, and the desire to achieve predictable outcomes through a consistent approach that will encourage parties to avoid unnecessary litigation.

In *Zavarella*, the Ontario Court of Appeal dealt with four issues, but only one of them will be dealt with here: what was Ms. Zavarella's date of marriage debt?

Ms. Zavarella had $49,838.70 of debt on the date of marriage (the "Debt") and made an assignment in bankruptcy with the encouragement of her soon to be husband. The Debt was discharged during the marriage.

At trial, Ms. Zavarella argued that the Debt should not be included in her net family property ("NFP"). The trial judge disagreed, and Ms. Zavarella appealed.

On September 25, 2013, the appeal was heard by a three-judge panel: Justices Gillese, Strathy and Juriansz. The panel split on the issue of Ms. Zavarella's date of marriage debt. Justices Gillese and Strathy formed the majority and argued that the court had and should exercise its discretion to determine the meaningful value of the debt. They allowed Ms. Zavarella's appeal on this issue and discounted the Debt to zero because the decrease in debt did not correspond to a decrease in the family's assets.

In dissent, Justice Juriansz reasoned that by design the legislature had adopted a formulaic approach "to reduce family law litigation by wringing judicial discretion out of the system". Justice Juriansz concluded that the trial judge was correct to include the Debt in Ms. Zavarella's NFP.

Reaction to *Zavarella* has been strong:

> The majority approach, if applied to all debts, will indeed lead to a diminishment of the certainty and finality philosophy of the *Family Law Act*.

> I would hope that this issue will be revisited by the Ontario Court of Appeal in a subsequent case which will require a five-person court to review this important principle. [1]

But is the majority's decision that radical? What impact will it reasonably have on the practice of family law in Ontario and other jurisdictions? To achieve an equitable result between the parties, the majority reasons by analogy from *Poole v. Poole,* 2001 CanLII 28196 ("*Poole*") and *Greenglass v. Greenglass,* 2010 ONCA 675 ("*Greenglass*") but fails to adequately explain why those cases are analogous to *Zavarella* and, as a result, has created uncertainty about the limits of its decision. For its part, the minority follows a consistent, predictable, formulaic approach but does not address the legislature's failure to define and either limit or expand the words "debts or other liabilities" in the *Family Law Act,* R.S.O. 1990, Chapter F.3 (*"FLA"*). The minority decision does not adequately address the critical proposition supporting the majority's conclusion: the court cannot insert the face value of a date of marriage debt into the NFP calculation if the debt decreases by the date of separation without diminishing the family assets. This paper briefly explores the arguments of both the majority and minority. Our analysis begins with the *FLA.*

<u>Sections 4 and 5 of the *FLA*</u>

At the end of a marriage, the spouses divide the *value* of property accumulated during the marriage or share in the reduction of property—an economic partnership. The spouse with the lesser net family property is entitled to an equalization payment. This entitlement does not give the spouse a property

[1] Philip Epstein, *Epstein's This Week in Family Law*, Fam. L. Nws. 2014-10; Philip Epstein, *Epstein's This Week in Family Law*, Fam. L. Nws 2014-06.

interest in the other's assets, but creates a monetary debt equal to half of the difference between the spouses' NFPs.[2]

The value of wealth accumulated is determined by taking a snap shot of each spouse's assets, debts and liabilities at the date of marriage and at the date of valuation—most often the date of separation. The net change in financial circumstances of each spouse is his or her NFP:

> "net family property" means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,
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> (a) the spouse's debts and other liabilities, and
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> (b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities, other than debts or liabilities related directly to the acquisition or significant improvement of a matrimonial home, calculated as of the date of the marriage.[3]

It must be noted that the legislature does not define "value". Nor does it define "debts or liabilities". The effect of the above is that: (1) the value of property on the valuation date, and (2) debts on the date of marriage that are reduced by the valuation date increase a spouse's NFP. And two factors reduce the NFP: debts and other liabilities on the valuation date and the value of property on the date of

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[2] J MacDonald and A Wilton, Family Law Act of Ontario, online: WestlawNext Canada <http://nextcanada.westlaw.com>, 5§1 — Entitlement To Equalization Payment, 4§1 — Overview of Family Property ; *Family Law Act*, R.S.O. 1990, CHAPTER F.3, s. 5; *Berdette v. Berdette*, 1991 CarswellOnt 280 at para 31 (CA); leave to appeal refused (1991), 85 D.L.R. (4th) viii (note), 137 N.R. 388 (note), 55 O.A.C. 397 (note) (SCC).

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[3] *Family Law Act*, R.S.O. 1990, CHAPTER F.3.

marriage. To reduce the likelihood that a spouse will have to make an equalization payment, she is incentivized to reduce, as much as permissible, the value of her property on the valuation date, and the value of debts held on the date of marriage but reduced prior to the valuation date; and to maximize her debts and liabilities on the valuation date and the value of her property on the date of marriage.

To inhibit unconscionable behaviour, the legislature has given the court discretion to award a spouse an amount that is more or less than half the difference between the NFPs if the court concludes that equalizing the NFPs would be unconscionable.[4] This remedy is seldom applied because the threshold to establish unconscionability is exceptionally high: the circumstances must "shock the conscience of the court".[5]

As noted earlier, the definition of NFP under section 4 of the *FLA* is concerned with value of property rather than property itself. The courts have interpreted "value" flexibly without any precise definition or particular meaning, such as market value. They have interpreted the legislature's omission of a definition of "value" to be "an invitation to determine 'value' in accordance with the circumstances of each case".[6] And the courts have applied varied valuation approaches to determine the "value" of both assets, such as businesses, cars and jewellery, and debts. Fair market value or value to owner may be applied.

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[4] *Family Law Act*, R.S.O. 1990, CHAPTER F.3, s 5(6).

[5] *Serra v. Serra*, 2009 ONCA 105 at para 47; J MacDonald and A Wilton, Family Law Act of Ontario, online: WestlawNext Canada <http://nextcanada.westlaw.com>, 5§1 — Entitlement To Equalization Payment.

[6] *Balcerzak v. Balcerzak*, 1998 CarswellOnt 3785 at para 11 and 15 (Gen Div); additional reasons 1998 CarswellOnt 4256 (Gen Div); *Djakovic v. Djakovic,* 1991 CarswellOnt 1414 at para 6 (Gen Div); *Rawluk v. Rawluk*, 1986 CarswellOnt 287 at 25 (H Ct); affirmed 1987 CarswellOnt 234 (CA); affirmed [1990] 1 S.C.R. 70 ; J MacDonald and A Wilton, Family Law Act of Ontario, online: WestlawNext Canada <http://nextcanada.westlaw.com>, 4§2.3 — Meaning of "value".

Presumably, while exercising their discretion to interpret the meaning of "value", the courts have been bound by their sense of fairness.

Determination of value appears to include not only the appropriate valuation approach to determine an asset's worth, but also the costs of disposition. In determining the value of property, the court may consider the costs of disposition provided the court is satisfied on a balance of probabilities that the disposition will happen at a particular time in the future and may discount disposition costs as such. It is unclear whether the deduction of notional costs of disposition effects the value of property, or if notional costs of disposition are debts or other liabilities.[7]

Unlike "property", which is a defined term under section 4 of the *FLA*, references to "debt" in section 4 are not modified by the words "value of".

Zavarella v. Zavarella, 2013 ONCA 720 (CA)

One of the key issues before the court in *Zavarella* was how much, if any, of Ms. Zavarella's debt was to be treated as date of marriage debt for the purpose of calculating her NFP.

Filomena and Rony Zavarella married on August 21, 1994. Nine days before the marriage, Ms. Zavarella made an assignment in bankruptcy with the encouragement of her soon to be husband. She had $49,838.70 of debt on the date of marriage. Nine months after her assignment in bankruptcy, she was

[7] *Sengmueller v. Sengmueller*, 1994 CarswellOnt 375 at para 18 (CA); *Hawkins v. Huige*, 2007 CarswellOnt 6762 at para 105 (Sup Ct J); additional reasons 2007 CarswellOnt 8170 (Sup Ct J); J MacDonald and A Wilton, *Family Law Act of Ontario*, online: WestlawNext Canada <http://nextcanada.westlaw.com> 4§2.5 — Value — Costs of Disposition — Taxes.

discharged. Neither spouse made a single payment on the debt during the marriage. The Zavarellas separated on July 30, 2009.

At trial, Ms. Zavarella argued that the debt should not be treated as a date of marriage debt, but treated analogously to a contingent liability, for the purposes of calculating her NFP. She called expert evidence, which the trial judge accepted, in support of her position. The expert testified that given her age, income and personal circumstances there was no expectation as of the date of marriage that she would be required to repay any of the debt.

Justice Reid, the trial judge, rejected her position ruling that the debt existed and was fixed at the date of marriage. Justice Reid ordered Mr. Zavarella to make an equalization payment of $38,955 to his wife.

Ms. Zavarella appealed this and other issues. On September 25, 2013, Justices Gillese, Strathy and Juriansz heard the appeal. The court was divided on one issue: what was Ms. Zavarella's date of marriage debt? Justices Gillese and Strathy formed the majority.

The Majority's Reasons

The majority's priority was equitably resolving the matrimonial dispute between the parties. It concluded that the trial judge should have discounted Ms. Zavarella's debt to zero. Under section 5 of the *FLA* spouses are to share equally in the increase in value of family property between the date of marriage and separation. Under subsection 5(1), the spouse with the lesser NFP is entitled to half of the difference between the spouses' NFPs.

NFP as defined by subsection 4(1) includes debt. Debt is included because a decrease in debt during marriage results in a corresponding decrease in family assets. "However, if the evidence does not support this assumption, the court cannot simply insert the face value of the debt into the NFP calculation" [emphasis added]. That would undermine the objective of an equalization payment which is to split equally between the spouses the net wealth accumulated from the date of marriage to the date of separation.[8]

To meet the objective of an equalization payment, the court must make a meaningful determination of value to attribute to the date of marriage debt. Treating debt similar to a contingent liability gives a meaningful determination of the value of the debt, and therefore, debt should be valued based on the reasonable likelihood that it will ever be paid.

Ms. Zavarella made an assignment into bankruptcy before the date of marriage. Her husband encouraged her to do it. Ms. Zavarella called expert evidence to show that there was a very low risk that she would be called upon to pay the debt. The trial judge accepted the expert's evidence, which was sufficient to determine the issue, and therefore, the date of marriage debt should be zero.

Justices Gillese and Strathy relied on *Greenglass* and *Poole* in coming to this conclusion. Acknowledging that "there are no cases directly on point," the majority relies on *Greenglass* and *Poole* for the proposition that a court may reduce the face value of a debt to zero if it finds at the relevant date (i.e. date of marriage or separation) that there is no, or a very low risk that the debt will be called on. However, the majority fails to explain why it is reasonable to analogize

[8] *Zavarella v. Zavarella*, 2013 ONCA 720 (CanLII) at para 33.

from *Greenglass* and *Poole.* All of the cases deal with the valuation of debts and liabilities for equalizing the spouses' NFPs. But this is where the similarities end. *Greenglass* is a case about valuing contingent liabilities on the date of separation.

For our purposes, the critical issue in *Greenglass* was whether Mr. Greenglass should have been able to deduct future costs of litigation from his NFP. The parties married in 1971. In 1999, Mr. Greenglass was fired from his job as a property manager for alleged wrongdoing and was sued by his employer for $4.8 million. Mr. Greenglass counterclaimed for wrongful dismissal and other damages. The litigation (the "Brad-Jay litigation") ended on June 21, 2007, when the Supreme Court dismissed the employer's application for leave to appeal. Neither party had proved its claims at trial in 2005, but Mr. Greenglass chose not to appeal. After accounting for costs awards in his favour, Mr. Greenglass was left with net legal fees of $564,640.[9]

Six years before the Brad-Jay litigation finally resolved, the Greenglasses separated in 2001. Mr. Greenglass sought to include his net legal fees from the Brad-Jay litigation as a contingent liability on the date of separation to reduce his NFP. At trial in 2009, his lawyer from the Brad-Jay litigation testified that the litigation with his former employer would not have settled unless Mr. Greenglass capitulated. There was also evidence that the projected litigation costs from the Brad-Jay litigation would be several hundreds of thousands of dollars. The trial judge, Justice Allen, only permitted Mr. Greenglass to deduct $6,033 for the

[9] *Brad-Jay Investments Limited and Village Developments Limited v. Mel Greenglass, also known as Melvin Green Glass, Triple A Property Management, 350052 Ontario Ltd. carrying on business as the Rexdale Lottery Boutique and 719931 Ontario Ltd*., 2007 CanLII 67861 (SCC)—note the trial judge dismissed all claims, and Mr. Greenglass did not appeal the dismissal of his claims. *Greenglass v. Greenglass*, 2010 ONCA 675 – Note: Justice Epstein references two slightly different figures for Mr. Greenglass's net legal costs $564,640 at para 5 and $564,840 at para 21.

balance of the legal costs owing on the date of separation. Justice Allen was concerned that Mr. Greenglass had benefited from hindsight to value his future legal fees at the date of separation. She was also concerned that his financial statement did not account for the value of his contingent asset from his counterclaim. Mr. Greenglass appealed.

Writing for a unanimous court, Justice Epstein held that the trial judge had erred in rejecting Mr. Greenglass's deduction for future legal costs as the litigation with his employer arose from actions taken during the marriage, the claim had crystallized before the date of separation, and the future legal expenses were reasonably foreseeable given the employer's unwillingness to settle for less than it was seeking. The court reasoned that although there was uncertainty about the likelihood of success of any of the claims made by the husband from the Brad-Jay litigation, there was certainty that Mr. Greenglass would incur additional legal fees. Justice Epstein assessed Mr. Greenglass's reasonably foreseeable, unrecoverable legal costs at $300,000.[10] Expert evidence was called on the anticipated fees.

In *Greenglass*, given the facts of that case, Justice Epstein did not articulate or consider in her reasons the proposition supporting the majority's reasons in *Zavarella*, namely that the court cannot insert the face value of a date of marriage debt into the NFP calculation if the debt decreases by the date of separation without diminishing the family assets. This proposition also was not articulated or considered by Justice Heeney in *Poole*.

[10] *Greenglass v. Greenglass*, 2010 ONCA 675 (CanLII).

The issue in *Poole* was whether funds provided to a couple from the husband's parents were a gift or a loan. The parents advanced the couple more than $80,000 via three promissory notes. When the couple first received the money, the wife made several repayments to the husband's parents, but stopped out of concern for the effect of the repayments on her father-in-law's taxes. The wife included about half of the value of the monies provided by the parents as a loan on her sworn financial statement. Although the court accepted the wife's evidence that the funds advanced would be taken account of upon the parents' death as a credit toward the husband's inheritance, the court concluded that the payments were a loan, but discounted the promissory notes by 90% in the husband's NFP on the basis that the probability of the husband repaying the debts was extremely low.

<u>The Problem with relying on *Greenglass* and *Poole*</u>

The majority's reasoning by analogy from *Greenglass* and *Poole* is problematic. Briefly it does not seem appropriate to analogize from *Greenglass* for as Justice Juriansz noted in his dissent, *Zavarella* "is different because the wife's date of marriage debts [in *Greenglass*] were not contingent but actual".[11]

The majority's reliance on *Poole* is problematic for two reasons. The first reason is hindsight. In parent-loan-to-kid cases, at the time of its decision the court does not know if the monies will be repaid, the court guesses how much, if any, of the debt will be forgiven based on the previous conduct of the parties. Many circumstances or factors are taken into account by courts in a variety of cases dealing with family debt. This is not the situation in *Zavarella* or cases like it. By

[11] *Zavarella v. Zavarella*, 2013 ONCA 720 (CanLII) at para 88.

the valuation date, the parties knew precisely how much of the date of marriage debt at issue had been extinguished. Those facts clearly are the most compelling evidence of the debt's value on the date of marriage. Hindsight will inevitably inform the parties', their experts' and the trier of fact's opinion on the meaningful value of the debt on the date of marriage. This is a critical difference between cases like *Poole* and *Zavarella* that should inhibit the court from analogizing between them.

Let us assume that the date of marriage debt is extinguished entirely during the marriage, neither spouse has made a payment towards it since the date of marriage but no expert is prepared to give an opinion (or at least one that the court would accept) that given the debtor's circumstances at the date of marriage the debt would not have to be repaid. Let us also assume the factual evidence does not show that a decrease in debt during the marriage resulted in a corresponding decrease in family assets. What is a court to do? The majority was clear "if the evidence does not support [the] assumption [that a decrease in debt during the marriage resulted in a corresponding decrease in family assets], the court cannot simply insert the face value of the debt into the NFP calculation" [emphasis added].[12] Following *Zavarella,* it is not clear what the court would do without an expert opinion in these circumstances. If the court decreases or extinguishes the debt, then hiring an expert opinion on the issues as to the reasonable foreseeability of the value of the debt at the date of marriage would seem unnecessary. What is a lawyer to advise her client about the necessity of

[12] *Zavarella v. Zavarella*, 2013 ONCA 720 (CanLII) at para 33.

calling an expert to testify about the discount of date of marriage debt? How is a lawyer to know what evidence to call?

Alternatively, let us assume that the date of marriage debt is extinguished entirely during the marriage, neither spouse has made a payment towards it since the date of marriage but an expert is only prepared to give an opinion to the effect that given the debtor's circumstances at the date of marriage only half of the debt would have to be repaid. Let us also assume the factual evidence does not show that a decrease in debt during the marriage resulted in a corresponding decrease in family assets. What is a court to do? Again, the majority was clear "if the evidence does not support [the] assumption [that a decrease in debt during the marriage resulted in a corresponding decrease in family assets], the court cannot simply insert the face value of the debt into the NFP calculation" [emphasis added].[13] Following *Zavarella*, it is unclear if the court would discount the entire amount of the debt in accordance with the factual evidence, or only half in accordance with the expert evidence.

There is a second reason that the majority's reliance on *Poole* is problematic. As Justice Juriansz explained, it is inappropriate to analogize from parent-loan-to-kid cases. In those cases, payment is either a loan or a gift. Whatever is discounted is a gift, and gifts from a third party after the date of marriage are specifically excluded under subsection 4(6) of the FLA. There is no suggestion in the FLA formula that certain debts will not be included in the NFP calculation. The FLA

[13] *Zavarella v. Zavarella*, 2013 ONCA 720 (CanLII) at para 33.

does not give judges the discretion to exclude or to discount date of marriage debt.

The Minority's Reasons

The minority took a formulaic approach in calculating the parties NFPs. Juriansz J.A. dissented. He concluded that Ms. Zavarella's debt should not be discounted. The legislature adopted a formulaic approach to limit judicial discretion. That discretion is limited to "unconscionability". Justice Juriansz's approach favours certainty.

A different court exercising such a discretionary approach may have set the debt at some other value (a criticism which could equally be applied to parent-loan-to-kid cases and to contingent liability cases). Further, the majority's approach could be expanded to other kinds of debt, such as lines of credit, personal loans, credit cards, or the notional costs of disposition of assets.

Expert evidence would be required in many cases, which would lead to more litigation, but also to less certainty and predictability. Successfully extinguishing other kinds of debt may depend on different factors, including the persistence of the debtor, her value as a customer to the creditor, and the particular agent of the creditor who first receives a request to extinguish all or part of the debt.

Justice Juriansz succinctly described his concerns as follows:

> My larger concern is that my colleague's reasoning cannot be confined to cases in which one spouse has made an assignment in bankruptcy. The principle that courts have the discretion to determine, for NFP purposes, a liquidated debt's "true" value while disregarding its face value could apply to many kinds of debt, whether owed by or to a spouse. In my opinion,

> recognizing judicial jurisdiction to value particular debts raises the spectre of family law litigants looking to the court to rate the quality of all of the debts they owe or are owed. Not only would the outcomes be uncertain and unpredictable, but the resolution of each case would require evidence about the particular circumstances. Expert opinion would be required in a great many cases.
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> The certainty and predictability provided by the statutory equalization formula would be undermined. The result would be greatly expanded scope for litigation in the already overburdened family courts.[14]

Although, Juriansz J.A. formulaic approach would likely lead to more predictable, consistent results, it seems rather harsh. All things being equal, what is at stake for Ms. Zavarella is an additional equalization payment of approximately $24,919.35, a 64% increase of the equalization payment that the trial judge had awarded. Although her debt existed and was fixed on the date of marriage, at the date of marriage she apparently had no expectation that she would have to repay the debt, and that expectation did not seem to change as the parties made no payment towards it. There was no evidence that any of the parties' marital resources were spent servicing the debt. In other words, the parties shared financial assets during the marriage, suffered no depravation corresponding to Ms. Zavarella's discharge from bankruptcy. But as Philip Epstein observed: "Justice Juriansz attaches no significance to the fact that the wife was discharged from bankruptcy without having to pay the debts since the subsequent events should have no effect on the calculation on the date of marriage" and cited the

[14] *Zavarella v. Zavarella*, 2013 ONCA 720 (CanLII) at para 94 and 95.

Court of Appeal's decision in *Dembeck v. Wright* in support Justice Juriansz for the proposition that hindsight should not be used.[15]

However fairness may not be the strongest argument in support of the majority's approach. Although Justice Juriansz notes that the definitions provided in subsection 4(1) "flesh out" how the NFP is to be calculated, he did not explore the meaning of "debt" under the *FLA* or how the courts have interpreted its meaning and the limits of its discretion in interpreting its meaning, apart from his comments on *Poole* and *Greenglass*.

Perhaps the majority's approach is more consistent with the court's historical interpretation of subsection 4(1). The definition of NFP modifies property with the words "value of". Through sections 4 and 5 of the *FLA*, the legislature intended to entitle the spouse with the lesser NFP to a monetary payment, not a proprietary interest in the other spouse's property. The words "value of" make this clear. Out of necessity, the court must exercise its discretion to value property which is not liquid; however, the court appears to have also interpreted the inclusion of "value of" as giving it the discretion to account for the costs of disposition when determining the value of property to give property a meaningful value for the purposes of sections 4 and 5[16].

Unlike "property," "debt" is not a defined term in the *FLA*. Commonly defined, "debt" means money, goods or services owing. "Debt", as commonly understood, is not restricted to money. Although debt is not defined in the FLA to mean

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[15] Philip Epstein, *Epstein's This Week in Family Law*, FAMLNWS 2014-06; *Dembeck v. Wright*, 2012 ONCA 852; *Zavarella v. Zavarella*, 2013 ONCA 720 at para 104.

[16] *Sengmueller v. Sengmueller*, 1994 CarswellOnt 375 at para 18 (CA); *Hawkins v. Huige*, 2007 CarswellOnt 6762 at para 105 (Sup Ct J); additional reasons 2007 CarswellOnt 8170 (Sup Ct J); J MacDonald and A Wilton, Family Law Act of Ontario, online: WestlawNext Canada <http://nextcanada.westlaw.com> 4§2.5 — Value — Costs of Disposition — Taxes.

money or modified by the words "value of," the courts have reasonably interpreted it to mean money or have, at least, inferred discretion to value non-liquid debt for the purposes of determining a spouse's NFP. In other words, the court has implied the words "value of" in regards to debts and liabilities, even where they do not exist. As a matter of consistency, in determining the value of debt, the court arguably ought to have the discretion not only to value non-liquid debt (for example, through expert valuations) but also to look beyond the face value of a debt to determine its meaningful value.[17]

Accounting for the costs of disposition to determine the value of assets and reducing the face value of a marriage date debt appear to be very different things, but have much in common. In both instances the court is attempting to determine *value* based on a future event that will reduce the value of property or debt, respectively. Further, the future costs of disposition can be as uncertain on the date of valuation as the future amount of debt that may be discharged or forgiven. For example, a real estate commission, which is a typical cost of disposition of a commercial property, will depend on the future sale price and may be unknown as of the valuation date. The cost of lawyer's fees to dispose of the property will also depend on the complexity of the issues involved and may also be unknown at the relevant time.

That being said, these costs of disposition are, arguably, more properly characterized as contingent liabilities. Such a characterization keeps their determination separate from the exercise of valuing an asset; however, this distinction does not alter the fact that the costs of disposition run hand-in-hand

[17] *Poole v. Poole*, 2001 CanLII 28196 at para 32 (Sup Ct J).

with the transfer of the asset and, furthermore, the courts have not historically kept this distinction clear and have reduced the face value of an asset by the costs of disposition, rather than treat the costs of disposition as a liability.[18]

Conclusion

At this point, it is likely too early to tell what effect *Zavarella* will have on the volume or complexity of cases dealing with the value of date of marriage debt that is reduced by the date of separation without a corresponding decrease in the family assets during marriage. It is unclear if factual evidence that a date of marriage debt was reduced without a corresponding decrease in the family assets during marriage will be sufficient for a court to reduce the debt for the purposes of calculating the debtor spouse's NFP, or if expert evidence will also be required. Further, it is unclear what the court will do if a conflict arises between the expert evidence and the factual evidence. What is clear is that prudent counsel must now obtain expert evidence, in addition to factual evidence, if this issue arises until the Court of Appeal clarifies *Zavarella*. This will inevitably increase legal costs where the inclusion of a date of marriage debt (or possibly date of separation debt) has a significant effect on the quantum of the equalization payment.

Zavarella highlights that although the legislature may have adopted a formulaic approach "to reduce family law litigation by wringing judicial discretion out of the system," the courts have carved out a fair amount of discretion by interpreting "value" in sections 4 and 5 of the *FLA*.

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[18] *Sengmueller v. Sengmueller*, 1994 CarswellOnt 375 at para 18 (CA); *Hawkins v. Huige*, 2007 CarswellOnt 6762 at para 105 (Sup Ct J); additional reasons 2007 CarswellOnt 8170 (Sup Ct J); J MacDonald and A Wilton, Family Law Act of Ontario, online: WestlawNext Canada <http://nextcanada.westlaw.com> 4§2.5 — Value — Costs of Disposition — Taxes.

The absence of a definition of “debts or other liabilities” in the *FLA* may have contributed to the majority‘s comfort in arriving at its conclusion.